No. 9579.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

COAST FEDERAL SAVINGS AND LOAN ASSOCIATION OF LOS ANGELES, a corporation,

Appellant,

vs.

R. M. CRAWFORD, Trustee in Bankruptcy of the Estates of Maxfield-Wilton & Associates, Inc., a corporation, debtor, Residential Income Properties, Inc., a corporation, subsidiary debtor, and Wilton-Maxfield Management Company, a corporation, subsidiary debtor; MAXFIELD-WILTON & ASSOCIATES, INC., RESIDENTIAL INCOME PROPERTIES, and WILTON-MAXWELL MANAGEMENT COMPANY,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Appellees have failed in their brief to separate the various theories and arguments therein set forth. For purposes of clarity, reply and references will be made to appellees arguments by page number.

The Debtor Corporation Was a Guarantor Bound by its Contract.

Appellees urge, in pages 2-4 of their brief that the Debtor Corporation was the purchaser, and the referee's finding of fact to that effect was a proper finding of fact and not an erroneous conclusion of law.

An appellate court is not bound by a purported finding of fact if it amounts to an erroneous conclusion of law.

> *San Diego Trust & Savings Bank v. County of San Diego,* 100 Cal. Dec. 244 (Supreme Court of Calif.).

Our original argument on this point stands.

In support of this erroneous finding, however, appellees refer to a small portion of Trustee's Exhibit 1. A full examination of this exhibit [Clk. Tr. pp. 36-38] reveals that the letter was written to Hugh Wilton, without reference to any connection with the Subsidiary Debtor and that said letter also stated:

> "Title to be shown in the name of Joseph Honey, a single man. The firm of Wilton, Maxfield, Wright and Company will guarantee the note * * *"

and also

> "* * * we will advise you to have Joseph Honey come in and sign the note and deed of trust, together with Escrow instructions, and, *at the same time, secure the guarantee of the note by Wilton, Maxfield, Wright and Company.*"

Appellees further overlook their Exhibit No. 2 [Clk. Tr. pp. 39-40] a letter of later date, which states:

> "In connection with property which we are selling to Joseph Honey, we enclose copy of escrow instructions for your files.
>
> "We also enclose estimate of Honey's charges, showing $11.00 due from him. May we have your check for this amount."

and also appellee's Exhibit No. 3 [Clk. Tr. pp. 40-43] the escrow instructions which Joseph Honey signs as buyer and which provides [Clk. Tr. p. 42] "Said note is to be guaranteed by Wilton Maxfield Wright & Company." Appellees further disregard their Exhibit No. 4 [Clk. Tr. p. 44], which states:

> "We have completed our above escrow covering the sale of property to Joseph Honey. We wish to advise that the charge for recording trust deed was $3.30, instead of $2.50, as estimated by us, and we, therefore, ask that *Mr. Honey* furnish us with 80¢ covering this difference." (Italics ours.)

It is our contention that the referee erred in looking beyond what appellees call (page 3) "the form of the papers, which were executed by the respective parties" for those papers were in fact the contract between the parties. Nor were these papers merely matters of form; on the contrary the papers consisted of a promissory note, a deed of trust, and a contract of guaranty, all of which are substantive contracts of the widest use.

In addition we submit that having erred in looking beyond the contract to perceive a new and different contract, the referee erred again in the conclusions which he drew from Trustee's exhibits. As in the *San Diego* case, *supra,* there was here no conflict in relation to those or any of appellee's exhibits. A conclusion that as a matter of law, those documents constitute a contract between appellant and the Subsidiary Debtor, and the necessarily supplemental conclusion that the formal contract of guaranty [Clk. Tr. p. 9] is not a contract at all, is clearly erroneous conclusions of law which cannot be permitted to stand as purported findings of fact.

The Provisions of Section 580b of the Code of Civil Procedure Are Here Inapplicable.

Appellees primarily rely (pp. 4-6) on section 580b of the Code of Civil Procedure of the State of California. In doing so appellees concede that this reliance is predicated upon the theory that Subsidiary Debtor is in fact the "real purchaser". These words have, however, no meaning in relation to this question. Whatever loose language may be used, the fact remains that the purchaser who gave the note secured by the purchase money deed of trust was Joseph Honey. We submit that it is inconceivable that a deed of trust can be a purchase money deed of trust when the trustor is not the purchaser.

In connection with the purpose ascribed to the California legislature in enacting section 580b is a conjecture on the fact of both the referee and appellees. We wish to observe that if that were indeed the purpose of the legislature, section 580b is useless to that end for section 580a covers the situation more fully. For while a vendor may in truth recover the identical property which he has sold,

he does not necessarily recover a property of equal value. Taxes may have accrued or the property may have been restricted as to use or depreciated considerably. If the procedure of section 580a were used he is still prevented from unjustly enriching himself but at the same time he is entitled to recover any actual loss which he may otherwise sustain by reason of newly accrued taxes or depreciation, damage or obsolescence of the property.

We submit that far from attempting to create new California law by ascribing to the California legislature farfetched reasons for the enactment of legislation, it is the duty of this Court simply to interpret California statutes from the statutes themselves unless in this case the California Supreme Court has interpreted the statute, in which event this Court should follow that interpretation.

A Guarantee Does Not Come Within the Provisions of 580b of the Code of Civil Procedure.

Appellees contend (pp. 6 to 9), that appellant is in fact seeking to recover a deficiency judgment and that appellant is attempting to make "a distinction without a difference." In support of this contention appellees quote the definition of a deficiency from Black's Law Dictionary, 2nd Ed. page 345. The answer to that contention is that the decision of the Supreme Court of the State of California is paramount in the State of California and in the federal courts with reference to California statutes, to Black's Law Dictionary or any other law dictionary, as well as to the decisions in cases of outside jurisdictions relating to legislation of those outside jurisdictions. In the case of *Bank of America v. Hunter* (1937), 8 Cal. (2d) 592, 67 Pac. (2d) 99 (Supreme Court of Califor-

nia), the Supreme Court of the State of Califonia did in fact necessarily determine that the promissee under a guarantee covering a note secured by deed of trust upon real property was not seeking a deficiency judgment in an action against the guarantor for the difference between the proceeds of the sale of the real property under the deed of trust and the full amount of the guaranteed note. With the exception that appellant is here seeking to establish a claim in the Federal Court rather than seeking a judgment against the guarantor in a state court, the situations are identical. Appellees' contention that appellant is actually seeking to recover a deficiency judgment against guarantor for the balance remaining due on the obligation after the sale of the property which was given as security is the identical contention made by the unsuccessful guarantor in the *Hunter* case, when that guarantor sought protection of section 580a of the Code of Civil Procedure afforded to "deficiency judgment". That contention has been expressly negated by the Supreme Court of the State of California.

Even if the case of *Central Trust Co. v. Manly,* 100 Fed. (2d) 992, Circuit Court of Appeals, Fifth Circuit, and of *Honeyman v. Hanan,* 275 New York 382, were indistinguishable, the effect would be nothing more than to reveal inconsistency as between the states of California, on the one hand, and Florida and New York on the other, and in this case this Court would still be bound by the California decision. These cases, however, are clearly distinguishable. In the *Central Trust Co.* case the action is one against endorsers, not guarantors, and as is revealed in that case in Florida, the obligation of endorsers are those of sureties which in turn are obligations not upon separate contracts of endorsement but sim-

ply an obligation with the maker upon the note itself. In this case, however, the obligation is not that of an endorser or surety but that of a guarantor and as is revealed by both the *Bank of America v. Hunter* case (*supra*) and in case of *Loeb v. Christie,* 6 Cal. (2d) 416, 57 Pac. (2d) 1303, the obligation of a guarantor, at the time of this transaction, was different from that of a surety, and was an independent obligation, independent of the obligation of the principal.

As for the *Honeyman* case, that was not an action against a guarantor at all, but simply an effort to seek to reach further security so that the liability of the guarantor does not violate the rule of section 2809 of the Civil Code.

Appellees contend (pp. 9 to 12) that to hold guarantor liable would be to violate the principle of section 2809 of the Civil Code of the State of California, and in support thereof quote from the case of *Loeb v. Christie, supra,* and case of *McGirl v. Brewer,* 285 Pac. 208 (Oregon). A more careful reading of the *Loeb* case and particularly a reading of the balance of the paragraph of which the first sentence only is quoted by appellees would answer this question. In this paragraph the Court warned of the danger of confusing the obligation of the principal or maker of a mortgage or trust deed note with the remedy to enforce such obligation and further states that the principal debtor remains liable at all times and for the full amount of the obligation. This case, however, must be read in the light of the fact that it preceded enactment of sections 580a and 580b to show that it is not longer true that a deficiency judgment may be recovered against the maker except under the limited conditions of those sections. The underlying principle, however, remains the

same. This is revealed by the case of *Bank of America v. Hunter, supra,* which case was decided after the enactment of sections 580a and 580b. This case too is a complete answer to contention of appellees for in that case too, it was impossible to recover against the maker, but the payee was able to recover against the guarantor.

The explanation, we submit, is not at all complicated. It is based upon the principle that the obligation of the maker continues notwithstanding that that obligation may not always be capable of being enforced.

According to appellees' contention, the maker of a note secured by a purchase money deed of trust incurs no obligation to pay the same. That contention is not correct. A purchaser who gives a note secured by the real property purchased in fact incurs an obligation to pay that note though the remedy to effect the collection may as against him be limited in scope. The statement is illustrated by the case of *Hillen v. Soule* (1935), 7 Cal. App. (2d) 45.

In that case the purchaser of a parcel of property gave a note secured by a second deed of trust as part payment of the balance of the purchase price. The first deed of trust was foreclosed whereupon the holder of the purchase money deed of trust note sued the purchaser and recovered judgment. Although the learned referee could not see the application of that case to the instant case, it definitely demonstrates the existence of an obligation to pay the sum promised to be paid by the terms of the note, though that note be secured by a purchase money deed of trust.

Bank of America v. Hunter, Supra, Is Both Indistinguishable and Controlling.

Appellees (at p. 12) advance the theory that the *Bank of America v. Hunter* case is distinguishable upon the ground that the guarantee in that case was a continuing guarantee covering advances other than the note secured by deed of trust in that particular case. However, the action there was nevertheless based upon the guarantee in so far as it was guaranteeing the note secured by deed of trust. No part of the court's judgment attempts to distinguish between the fact that a specific guarantee of one note has a different effect than a guarantee of that same note but which also may guarantee other obligations. The basis of the court's decision there was that a contract of guarantee, in California, creates an independent obligation and that an action could be maintained against the guarantor and that the specific differences which might be raised by the principal obligor by reason of the statute concerning deficiency judgments could not be raised by the guarantor for the reason that the action against a guarantor was not for a deficiency judgment and statutes effecting deficiency judgments would not therefore apply.

Nor can the case be distinguished on the ground that it refers to section 580a rather than section 580b of the Code of Civil Procedure. As before stated by us those are the two sections dealing with deficiency judgments and the words "deficiency judgment" necessarily have the same meaning as used in both sections. It is the Supreme Court of California's interpretation of these words which are binding upon the Federal courts.

The Court Should Not Make Poor Law Because of an Apparently Hard Case.

On pages 12 and 13 appellees argue that as a matter of equity and justice the appellant should not be permitted to be "unjustly enriched" to the detriment of appellees. We submit that appellees are really urging this Court to alleviate an apparently "hard" case by making poor law. If, as we contend, the *Hunter* case (*supra*) covers a matter here involved the "hardness" of this case is not only immaterial but is not truly reflected, for if appellant is otherwise entitled, it was not required to present evidence simply for the purpose of showing, by evidence of accrued taxes and other prior liens and the implacement by the purchaser of additional restrictions upon the property, that the case was not as hard upon Subsidiary Debtor as might otherwise appear.

There Is No Question Here of Equal Protection of the Laws.

Although it is not argued, appellees allege in paragraph 4 of their summary on page 14, that if guarantor were entitled to recover, guarantors of notes secured by deeds of trust would not have the equal protection of the laws which guarantors or other obligors have. Since there is no argument we assume the point is not seriously urged but in any event *Bank of America v. Hunter, supra,* is as to this point, too, a complete answer to appellee's contention.

We submit, therefore, that for the foregoing reasons and those urged in appellant's opening brief, the claim of appellant be allowed as there requested.

Respectfully submitted,

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